

SERVICE DATE – LATE RELEASE JUNE 8, 2012

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 6 (Sub-No. 479X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN PAGE AND
FREMONT COUNTIES, IOWA

Digest:¹ This decision allows BNSF Railway Company (BNSF) to end its responsibility to provide rail service over a 5.95-mile rail line in Page and Fremont Counties, Iowa. BNSF plans to sell a 1.85-mile segment of the track to the sole shipper on the line for that shipper's use. As to the remaining segment of the line, the decision requires BNSF to keep certain railroad structures in place and sets a time period for it to negotiate with parties interested in turning that segment into a recreational trail.

Decided: June 7, 2012

By petition filed on February 21, 2012, BNSF Railway Company (BNSF) seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon a 5.95-mile rail line between milepost 20.05 in Shenandoah and milepost 26.0 in Farragut, in Page and Fremont Counties, Iowa. Notice of the exemption was served and published in the Federal Register on March 12, 2012 (77 Fed. Reg. 14,591). A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) between mileposts 21.90 and 26.0 was filed by the Iowa Natural Heritage Foundation on behalf of the Page and Fremont Counties Conservation Boards, the City of Farragut, and Southwest Iowa Nature Trails, Inc. (collectively, INHF).² BNSF responded, indicating that it agrees to negotiate with INHF for interim trail use/rail banking as to that segment of the line. The exemption will be granted subject to public use, trail use, environmental, and standard employee protective conditions.

BACKGROUND

BNSF states that it is seeking abandonment authority because there has been no overhead traffic on the line for many years, and no local traffic has moved between mileposts 21.90 and 26.0 since at least 2007. BNSF states that once abandonment has been authorized, it intends to

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The initial request was filed on March 14, 2012, and modified on March 26, 2012.

convert the only active portion of the line (between mileposts 20.05 and 21.90) to industry track and sell that track to the last remaining customer on the line, Green Plains Shenandoah LLC (GPS). GPS will use the trackage to stage trains. BNSF further states that GPS will continue to receive rail service as it has in the past. BNSF adds that GPS supports the proposed abandonment. BNSF claims that, by abandoning the line, it will be able to avoid significant opportunity costs and out-of-pocket expenses associated with retaining this largely dormant line.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. § 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of BNSF's proposal under 49 U.S.C. § 10903 is not necessary to carry out the rail transportation policy in this case. Most of the line has remained dormant since 2007, and, once abandoned, BNSF intends to sell the active segment of the line to the lone shipper on the line for the shipper's use to stage its trains for continued rail service. By minimizing the administrative expense of the abandonment application process, an exemption will minimize the need for Federal regulatory control over the rail transportation system, expedite regulatory decisions, and reduce regulatory barriers to exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). By abandoning the line, BNSF will be able to avoid opportunity costs and out-of-pocket expenses associated with retaining the line, while accommodating the transportation needs of the remaining shipper on the line. Thus, an exemption will also foster sound economic conditions and encourage efficient management by permitting the rationalization of an unnecessary rail line, consistent with 49 U.S.C. §§ 10101(5) and (9). Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power.³ BNSF states that GPS, the only shipper on the line, will continue to receive rail service as it has in the past and that GPS not only does not object to the proposed transaction, but supports it. Nevertheless, to ensure that GPS is informed of our action, we will require BNSF to serve a copy of this decision and notice on GPS so that it is received by the shipper within 5 days of the service date of this decision and notice and to certify contemporaneously to the Board that it has done so.

Employee protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the Board will impose the employee protective conditions set forth in Oregon Short Line—Abandonment Portion Goshen Branch

³ Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979)
(Oregon Short Line).

Environmental review. BNSF has submitted a combined environmental and historic report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA) has examined the report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA served an environmental assessment (EA) in this proceeding on April 20, 2012. In the EA, OEA states that the U.S. Department of Commerce, National Geodetic Survey (NGS) has indicated, in an e-mail dated March 14, 2012, that there are approximately three geodetic station markers located in the area of the proposed abandonment. Therefore, OEA recommends that a condition be imposed requiring BNSF to consult with NGS at least 90 days prior to the beginning of salvage activities that will disturb or destroy any geodetic station markers to allow for their relocation.

Comments to the EA were due by May 20, 2012. No comments were received. Accordingly, we will impose the environmental condition recommended by OEA in the EA. Based on OEA's recommendation, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Interim Trail Use. As indicated, INHF has filed a request for the issuance of a NITU for the segment of the line between mileposts 21.90 and 26.0, under the Trails Act and 49 C.F.R. § 1152.29, to provide time to negotiate with BNSF for acquisition of that portion of the right-of-way for use as a recreational trail and for rail banking. INHF has submitted a statement of willingness to assume financial responsibility for this segment of the right-of-way, and INHF has acknowledged that the use of the right-of-way for trail purposes is subject to future reconstruction and reactivation of the right-of way for rail service, as required by 49 C.F.R. § 1152.29. In a response filed on April 5, 2012, BNSF states that it agrees to negotiate for an interim trail use/rail banking agreement with INHF as to this segment of the line.

Because INHF's request complies with the requirements of 49 C.F.R. § 1152.29 and BNSF is willing to enter into interim trail use negotiations, we will issue a NITU for the segment of the line between mileposts 21.90 and 26.0. The parties may negotiate an agreement during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29 (d)(2), (h).⁴ If no agreement is reached within 180 days, BNSF may fully abandon the specified segment of the line, subject to the

⁴ National Trails System Act and Railroad Rights-of-Way, EP 702 (STB served Apr. 30, 2012). Final rule effective May 30, 2012.

conditions imposed below. See 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to any future use of the property for restoration of railroad operations.

Public Use. INHF also has requested imposition of a public use condition for the segment of the right-of-way between mileposts 21.90 and 26.0. It asks that BNSF be prohibited from disposing of the corridor, including tracks, ties, and signal equipment, except for public use on reasonable terms, and that BNSF be barred from removing or destroying potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment authorization. INHF's justification for its request is that the corridor will connect Farragut, an active bicycling and walking community, to the existing 63-mile Wabash Trace Nature Trail in Shenandoah. INHF also states that the corridor provides an important wildlife habitat.

The Board has determined that persons who request a NITU under the Trails Act may also seek a public use condition under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails (Rail Abans.), 2 I.C.C.2d 591, 609 (1986). When the requirements for both conditions are met, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. INHF has met the public use criteria prescribed at 49 C.F.R. § 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) the justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed on the segment of the line between mileposts 21.90 and 26.0, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the specified segment for public use. If a trail use agreement is reached on a portion of the right-of-way subject to this condition, BNSF must keep the remaining portion of the right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, it should be noted that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to negotiate to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, BNSF is not required to deal exclusively with INHF, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. § 10904. As stated in Rail Abans., 2 I.C.C.2d at 608, an offer of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations takes priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 C.F.R. § 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 C.F.R. § 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 C.F.R. § 1152.27 (f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by BNSF of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line, and the conditions that (1) with regard to the segment of the above-described line between mileposts 21.90 and 26.0, BNSF comply with the interim trail use/rail banking procedures set forth below, (2) BNSF be prohibited from disposing of the segment of the corridor between mileposts 21.90 and 26.0 (except tracks, ties and signal equipment)⁵ and from removing or destroying potential trail-related structures (such as bridges, trestles, culverts, and tunnels) for a 180-day period commencing from the effective date of this decision and notice until December 5, 2012, to enable any state or local government agency or other interested person to negotiate the acquisition of the specified segment of the right-of-way for public use, and (3) BNSF consult with NGS at least 90 days prior to the beginning of salvage activities that will disturb or destroy any geodetic station markers.

2. BNSF is directed to serve a copy of this decision and notice on GPS so that it is received by GPS within 5 days after the service date of this decision and notice and to certify contemporaneously to the Board that it has done so.

3. If an interim trail use/rail banking agreement is reached for the segment of the right-of-way described above, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to any future use of the property for restoration of railroad operations and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by December 5, 2012, the parties shall jointly notify the Board within 10 days and interim trail use may be implemented. If no agreement is reached by that time, BNSF may fully abandon that segment of the line, provided the conditions imposed above are met. See 49 C.F.R. § 1152.29 (d)(1). If an interim trail use/rail banking agreement is executed before December 5, 2012, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the line.

⁵ Although INHF has asked that tracks, ties and signal equipment be kept intact as well, INHF has provided no basis for us to depart from our standard practice of excepting those materials from the disposal prohibition. Consequently, we will not do so.

7. An OFA under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by June 18, 2012, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,500. See 49 C.F.R § 1002.2(f)(25).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

9. Provided no OFA has been received, this exemption will be effective on July 8, 2012. Petitions to stay must be filed by June 25, 2012, and petitions to reopen must be filed by July 3, 2012.

10. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by BNSF’s filing of a notice of consummation by June 8, 2013, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.